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No. 95-334

In The

Supreme Court of the United States

October Term, 1995

VILLAGE OF NEW LEBANON, et al.,

Petitioners,

v.

CYNTHIA BUNCH, ETC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the District Court and the Sixth Circuit Court of Appeals erred in holding that the existence of material factual questions defeat a motion for summary judgment.

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STATEMENT OF FACTS

A. Defendant Ables Responds To A Domestic Dispute And Shoots To Death Plaintiff's 16-Year-Old Son, The Sole Occupant Of The House, Within Two Minutes Of His Arrival At The Scene.

At 3:27 p.m. on the afternoon of January 28, 1992 the Montgomery County Sheriffs Office [MCSO] dispatcher took a call from Plaintiff Cynthia Bunch [Bunch] regarding a domestic dispute she was then having with her sixteen-year-old son, Aaron Bravard [Bravard].

At 3:30 p.m., Chief Carbaugh and Sgt. Lunsford of the New Lebanon Police Department, and Patrolman Murphy of the Jackson Township Police Department arrived at the Bunch residence.

Patrolman Ables, with the three other officers already on the scene, was the last to arrive. He pulled his gun and made a warrantless entry into Plaintiff's residence. Within two minutes of pulling up to the scene, with the benefit of no more information than that provided by the brief radio dispatch, or with no attempt to inquire as to the actual circumstances extent at the time of his arrival, Ables shot and killed Plaintiff's sixteen-year-old son who was alone in the house as he stepped out of the shower enclosure of his bathroom. At 3:32 p.m., Ables called for the ambulance.

Mrs. Bunch was outside the residence and in the presence of the Chief at all times from the time of the officers' arrival until well after Bravard had been shot. It is undisputed that Bravard was the only one in the residence. This fact was known to all of the officers prior to entering the residence. Mrs. Bunch was never in any

danger of harm at any time after the officers initially arrived at the residence. At no time did the officers seek nor did Mrs. Bunch give the officers permission to enter the residence. They had no warrant to enter the residence.

When Ables arrived at the scene he walked past the Chief and Mrs. Bunch who were conversing in the yard some distance away from the residence. Neither the Chief nor Mrs. Bunch ever expressed any alarm or concern that there was any need for immediate action by these police officers, in fact, the Chief, who was in command of the scene was not even aware that his officers were entering the residence until he looked up and saw them going inside. This situation was never considered to be anything more than a "domstic dispute" with the possibility that Bravard *might* be suicidal. These facts are undisputed.

B. Defendant Ables' Unsupported Version Of Events Is Called Into Question By Physical Evidence And Uncontested Medical Expert Testimony

Ables contends that he was being attacked by Bravard and shot in self defense. Ables' testimony is clear: he contends that he did not shoot Bravard until Bravard had exited the shower, turned to directly face him, and frontally attacked him with his right arm raised and holding a knife which was coming down in a slashing motion. At that point, he claims to have fired his automatic weapon.

Without question, if Ables' version of the facts had gone unrefuted, he would be entitled to qualified immunity. Plaintiff however produced evidence which directly

contradicted Ables' version of events. Plaintiff submitted proof, including uncontested medical expert testimony, that her son was shot in the side under his left arm pit not while attacking Ables but while getting out of the shower facing the wall in front of the shower.

Plaintiff submitted three key pieces of evidence which directly contradicted Ables' description of events surrounding the shooting – the affidavit of a pathologist and former deputy county coroner; the deposition testimony of the current deputy county coroner; and, the affidavit of Plaintiff. Defendants failed to oppose or challenge in any manner any of the statements contained in any of the affidavits or the deputy county coroner's deposition.

The affidavit of the former deputy county coroner unequivocally states, "it is physically impossible for the gunshot wound to Bravard to have occurred at a time when Bravard was directly facing Ables as described in Ables' testimony." This pathologist confirms that Ables shot Bravard as Bravard exited the shower, facing the *east wall of the bathroom*, in no position to attack or threaten Ables.

In addition to this evidence, Plaintiff deposed the present deputy county coroner who actually performed the autopsy of Bravard. He testified that it was "physically impossible" for Bravard's wounds to have occurred in the manner described by Ables. The "physical impossibility" testimony of these experts is based in large part upon the physical evidence itself. The bullet which killed Bravard entered under his *left arm pit* and travelled directly across his body *from left to right*. Such an entrance

point and direction of travel make it physically impossible for this wound to have occurred while Bravard stood directly facing Ables, who had his gun *waist high in his left hand two to three feet away* from Bravard.

It was Bravard's left side which faced Patrolman Ables with the bullet entering Bravard's left arm pit and travelling in a straight direction across his body. These facts are the uncontested conclusions of the autopsy and are not minimal discrepancies as Defendants argue. Ables simply could not have apprehended any threat of imminent bodily harm – Bravard was facing the wall, not Ables; he was not attacking or approaching Ables, but stepping out of the tub enclosure; and, he was in no position to slash at Ables with a knife purportedly held in his right hand with his left side nearest to Ables.

In addition to this medical expert testimony which remains uncontested by Defendants, Plaintiff submitted scale diagrams of the bathroom and shower enclosure. The diagram established that the deceased could only have exited the shower enclosure by pushing the bathroom door closed in order to widen the 14-inch enclosure opening. Bravard was five feet, ten inches tall and weighed 190 pounds. The Bunch affidavit makes it clear that no one the size of Bravard could have leaped through such a small opening in the manner described by Ables.

Plaintiff's affidavit, based on her years of actual experience of entering and exiting the same shower enclosure, also confirmed that it is necessary to push the bathroom door *closed* in order to widen the 14-inch opening and exit the shower. Ables clearly positions himself

standing in front of the *open* bathroom door when he shot Bravard.

Defendants submitted no affidavits, expert testimony or other material which contested or disputed this evidence. Defendants have never disputed the accuracy of the diagram submitted by Plaintiff. They have never challenged Plaintiff's assertion that the 14-inch shower enclosure opening was too small for Bravard to have leaped through in the manner Ables contends. They have never provided any expert testimony to support Ables' contentions or to attack or qualify the testimony of Plaintiff's experts.

Petitioners in their Petition indicate that Ables had been cut while in the bathroom. This statement is totally unsupported. At deposition, Ables testified that some time after the shooting after he had exited the residence he noticed a small scratch on one of his fingers which *he assumed to be a cut*. More on point is the deposition testimony of both Patrolman Ables and Sgt. Lunsford that no one had seen Bravard even attempt to cut Ables and that there is no physical evidence to support such a conclusion.

C. The District Court Ruled That Competing Versions Of Events Created Material Question For Jury Determination

The District Court concluded that the affidavits and supporting materials presented competing versions of what actually happened. The District Court further

concluded that the physical evidence is consistent with a version of events that would question the reasonableness of Ables' opinion that Bravard posed such a threat that shooting him was reasonable in the contest of qualified immunity. Given these fundamental questions, both the District Court and the Court of Appeals concluded that material jury questions exist.

REASONS TO DENY THE WRIT

I. This Evidence In This Case Raises Substantial Material Issues Of Fact And The Courts Below Correctly Determined That Such Issues Make Summary Judgment Inappropriate.

The Courts below found several factual disputes and discrepancies with regard to material issues. These issues go directly to the reasonableness of Patrolman Ables' use of deadly force.

Without question, Defendants have the right to argue that Ables' version of the facts should be believed and that any discrepancies are either minor or explainable. Defendants, however, cannot demand as a matter of law that the courts ignore factual evidence, ignore the implications of that evidence and conclude that any inferences should be resolved in favor of Defendants.

The physical facts and expert testimony indicate that Patrolman Ables shot Bravard (deceased) as he attempted to exit the shower of his own bathroom. Bravard was shot as he was facing the east wall of the bathroom, at a 90-degree angle to Ables – not facing Ables as contended by

the Defendants. Defendants attempt to mislead this Court by contending that the courts below based their rulings solely on the angle of the path of the bullet into Bravard's body. As significant as the bullet path is, however, it is not the only basis for the court's conclusion.

As the circuit court noted, the *totality* of the factual disputes and discrepancies are of such character that a person could reasonably conclude that Patrolman Ables did not act reasonably when he shot Bravard. The record contains a long list of cumulative facts in addition to the bullet's path – facts ranging from the autopsy report, the diagrams of the bathroom and Plaintiff's uncontested affidavit to the unchallenged testimony of two medical expert pathologists that it is "physically impossible" not only for things to have occurred as described by Ables but that the evidence indicates Ables was never threatened at all. Based upon a review of this material, it is clear that any reasonable person could conclude that Bravard was never in any position to do Patrolman Ables any bodily harm.

Next, Defendants fault the lower courts for not accepting their version of events. Defendants have always based their argument on the assumption that "Ables was suddenly confronted with a knife wielding individual" (Brief, p. 7) in a small place. The question is whether courts are required to start with that assumption, especially when substantial evidence exists which calls that assumption into question. Defendants fail to realize that the evidence in the record disputes this most basic fact concerning the essential elements of Plaintiff's claim and Ables' claim of self defense. It is exactly this dispute that must be resolved by a jury.

Defendants do not deny that factual disputes exist. Instead they complain that the courts below should have weighed the evidence and concluded that these factual disputes and conflicts were immaterial. The ultimate question raised by this case is whether Bravard was even in a position to be a threat or to be reasonably perceived as a threat to Patrolman Ables. All of the evidence Defendants are complaining about goes directly to this point. There simply is no legal support for the proposition that these lower courts had a duty to accept Defendants' starting assumption and then weigh the evidence within the context of that assumption *and* ignore the inferences favorable to the Plaintiff raised by that evidence.

Given the substantial discrepancies raised by the affidavits, diagrams, depositions and other materials which support Plaintiff's claim that her son was shot as he stepped out and over the tub enclosure, it was entirely appropriate for the lower courts to consider the justifiable inferences in Plaintiff's favor and deny summary judgment.

II. The Decisions Below Neither Raise Constitutional Issues Nor Conflict With Decisions Of Any Other Circuit Court Of Appeals.

At page 8 of their brief, Defendants plainly state their essential complaint against the decisions of the courts below. According to Defendants, the problem with those decisions is that "[they] permit[s] differing versions of an occurrence to rise to the level of genuine issues of material fact." (Brief, p. 8) Defendants contend that such a decision conflicts with other cases. Plaintiff respectfully

submits that no such conflicts exist. Defendants do not quibble with the determinations that factual disputes exist in the instant case. Instead they argue that other cases somehow stand for the proposition that "differing versions of an occurrence" cannot constitute material questions. This position has absolutely no support in the law.

In *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992), the district court determined that there were certain small discrepancies that did not rise to the level of creating a genuine issue of material fact.

Defendants attempt to create a conflict between the instant case and *Fraire, supra,* because the courts below determined that the material issues of fact exist in the instant case. Such a factual juxtaposition does not create a conflict between the cases. Plaintiff does not dispute that some cases may present inconsequential inconsistencies. Certainly everyone would concede that different cases may present different facts and, accordingly, each case would require conclusions based on the specific facts of that respective case. This fact does not however stand for the proposition that discrepancies in all cases are as a matter of law minor and inconsequential.

Defendants' reliance on *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993) is even more suspect. In *Krueger, supra,* the officer's testimony of what had transpired was totally undisputed. This stands in stark contrast to the instant case, in which Ables' testimony is totally contradicted by the physical evidence. Plaintiff respectfully submits that no conflict exists between *Krueger* and the instant case.

The facts are so divergent that the two are not comparable.

In fact, the Sixth Circuit Court of Appeals did consider the *Krueger* case in reaching its decision. That court rejected any purported conflict and instead correctly pointed out that its decision in the instant case is entirely consistent with the Eleventh Circuit case of *Samples v. City of Atlanta,* 846 F.2d 1328 (11th Cir. 1988). *Samples, supra,* involved, just as does the instant case, a discrepancy between the version of events put forward by a police officer who shot a person in the back but claimed the victim was advancing toward him with a knife. In cases such as these that involve material factual disputes, summary judgment is simply not the appropriate method for resolving the controversy. This proposition is entirely consistent with existing case law and does not present any conflict between the circuits.

The instant case presents no question of importance or constitutional magnitude. The analysis and conclusions arrived at by the lower courts directly relate to the evidence presented by the specific facts of this case.

CONCLUSION

Respondent respectfully submits that Petitioners have failed to establish any reason why a writ should be granted. For all the reasons discussed above, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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